SUPREME COURT, U.S.
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No. 96-1163

In The

Supreme Court of the United States

October Term, 1996

MALLOTT & PETERSON and
INDUSTRIAL INDEMNITY COMPANY,

Petitioners,

v.

BEATRICE STADTMILLER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an attorney is the "representative" entitled to compensation as referred to in 33 U.S.C. section 933(g).

2. Whether a client is bound by her attorney's actions in the absence of her express or implied authorization or ratification.

PARTIES TO THE ACTION

Defendants/Petitioners:	*Mallott & Peterson, Employer; and, Industrial Indemnity, Insurer*
Plaintiff/Respondent:	*Beatrice Stadtmiller, Widow of Delbert Stadtmiller*
Federal Respondent:	*Director, Office of Workers' Compensation Programs, United States Department of Labor*

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The Opinion of the Court of Appeal (Pet. App. A:1-11) is reported at 98 F.3d 1170. The Decision and Order of the Benefits Review Board (Pet. App. B:12-31) is reported at 28 Ben.Rev.Bd.Serv.(MB) 304. The Decisions and Orders of the Administrative Law Judge (Pet. App. C:32-52; Resp. App. A:1-9) are unreported.

II. JURISDICTION

The Court of Appeal entered its judgment on October 24, 1996. There were no Petitions for Rehearing. The Petition for a Writ of Certiorari was filed on January 22, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

III. STATEMENT OF THE CASE

The Longshore and Harbor Workers' Compensation Act (hereafter "LHWCA" or "the Act"), 33 U.S.C. section 901, *et seq.*, provides benefits to injured longshore employees and their dependent families. Those benefits may be terminated if the employee or dependent (hereinafter "claimant") settles a civil lawsuit for the same injury with third parties without the employer's consent.[1]

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[1] 33 U.S.C. section 933(g)(1) provides in pertinent part:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter,

Mallott & Peterson, employer herein, contends claimant Beatrice Stadtmiller's attorney entered into an unauthorized third party settlement even though both the client and her attorney denied the attorney possessed any authority to settle, nor actually settled the case. The attorney simply agreed to the value of the case and indicated he would recommend a settlement offer to the client, the client rejected the offer, did not sign any settlement releases, and did not receive any settlement monies. The courts below found this conduct did not constitute a settlement binding on the client, nor did it violate any statute. Yet employer attempts to portray a settlement based on incomplete facts in order to prematurely and unfairly trigger the forfeiture provisions of 33 U.S.C. § 933(g). After reviewing *all* the material facts, this Court should conclude the court below clearly did not err and should deny the Petition for Writ of Certiorari.

Employer Mallott & Peterson exposed employee Delbert Stadtmiller to asbestos during his 1940 to 1946 employment. In 1990 the employee developed lung cancer, secondary to asbestos exposure, from which he died on December 21, 1990. His widow, Beatrice Stadtmiller, thereafter sought LHWCA death benefits from Mallott & Peterson and its insurer Industrial Indemnity.[2] In February 1993, the parties resolved all pending issues by stipulation. One month later, employer moved to rescind the

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> the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer or the employer's carrier, before the settlement is executed. . . .

[2] Employer and carrier will hereinafter be referred to as "employer."

stipulations, and claimed an unauthorized civil settlement agreement with civil defendant Waldron Duffy by Mrs. Stadtmiller's attorney required termination of benefits, and summary judgment pursuant to 33 U.S.C. § 933(g). (Pet. App. A:33.)

Administrative Law Judge (hereinafter ALJ) Paul Mapes presided over the June 22, 1993 hearing, at which time the following facts were ascertained. In the spring of 1992, attorney Harry Wartnick of the Cartwright law office commenced representation of Beatrice Stadtmiller in a civil action filed against asbestos manufacturers and suppliers as a result of her husband's asbestos-related injury and death, upon referral from the law firm of Kazan, McClain, Edises & Simon, LHWCA counsel for Mrs. Stadtmiller. (Resp. App. E:25-26.) On April 16, 1992, and again on June 9, 1992, Mrs. Stadtmiller's longshore attorney advised Mr. Wartnick of the pending LHWCA action, and instructed Mr. Wartnick that the widow could not accept any civil settlements without the consent of the longshore carrier. (Resp. App. B:10-12.)

By deposition and declaration, Mrs. Stadtmiller confirmed Mr. Wartnick's representation, and unequivocally stated that "I have not authorized my attorneys to settle my civil lawsuit against any asbestos manufacturer in the absence of obtaining consent from Industrial Indemnity." (Resp. App. D:19, 21-22.) She knew that the LHWCA counsel had instructed Mr. Wartnick to not enter into any settlement without the consent of Industrial Indemnity. (*Id.* at p.19.) The widow denied receiving any civil settlement monies, nor providing authorization to dismiss any civil defendants. (*Id.* at p.17, 21.)

Attorney Wartnick testified at the June 22, 1993 hearing. He stated he never obtained authorization from Mrs.

Stadtmiller tc settle any part of her civil case. (Resp. App. E:26-27.) Addressing the claimed settlement agreement, Mr. Wartnick explained that in 1992 he entered into settlement negotiations with Roderick Jones, counsel for civil defendant Waldron Duffy, concerning a group of 60 cases, which included the Stadtmiller case. (*Id.* at p.54.) Mr. Jones communicated offers to settle the group of cases to Mr. Wartnick, who agreed to recommend the offers to his clients, stating "anything we did would have to be on a recommend basis." (*Id.*) Mr. Wartnick indicated that his office would prepare settlement papers and defendants could forward one check representing the settlement monies for the group of cases to Mr. Wartnick's office to hold in a trust account until the settlement releases had been signed and forwarded to defense counsel. (*Id.* at pp.54-55.) Mr. Wartnick agreed to sign requests for dismissals so that the civil defendant would not have to actively involve itself in the continuing civil litigation, "with the understanding that if the client rejected the offer, at that point, it would re-enter the litigation and would effectively be bound by whatever occurred in the interim." (*Id.* at p.55.) The monies were sent to Mr. Wartnick's office and deposited in his firm's trust account. (*Id.* at p.43.) Mr. Wartnick mistakenly signed a dismissal in the Stadtmiller case for Waldron Duffy with prejudice, rather than without prejudice, which was filed in Alameda County Superior Court. (*Id.* at p.39-40.)

The Waldron Duffy offer to Mrs. Stadtmiller amounted to $4,500.00. Attorney Wartnick never accepted the Waldron Duffy offer. (*Id.* at p.29.) Rather, his office communicated the $4,500.00 offer to Mrs. Stadtmiller, who rejected it. (*Id.* at p.55-56.) When Mrs. Stadtmiller rejected the offer, Wartnick advised Mr. Jones, who

agreed to vacate the request for dismissal and re-enter the litigation. (*Id.* at p.56.) *Settlement releases were never prepared in the Stadtmiller civil case. (Id. at p.57.) Funds delivered to Mr. Wartnick's office representing the Waldron Duffy settlement offer to Mrs. Stadtmiller were returned to counsel for Waldron Duffy. (Id. at p.49.) The civil settlement monies were never received by the widow. (Id. at p.28.) Finally, Superior Court Judge Ken Kawaichi approved the stipulated vacation of Waldron Duffy's filed dismissal. (Id. at p.51.)*

By deposition, defense counsel Roderick Jones confirmed that the agreement he had with Mr. Wartnick and the payment of money were contingent upon his receiving signed releases from Beatrice Stadtmiller. (Resp. App. F:69.) He never received releases signed by Beatrice Stadtmiller (*Id.* at p.64). He did not consider the Stadtmiller civil case to be settled. (*Id.* at p.70.) Mr. Jones also testified to his understanding that in California settlements were not enforceable absent a written agreement (*Id.* at p.68.) Finally, he confirmed that the monies were returned to his office, and he stipulated to a vacation of the filed dismissal. (*Id.* at p.65.)

In light of the above evidence, ALJ Mapes denied the motion for rescission of stipulations on October 18, 1993, finding widow Stadtmiller did not settle her civil case against civil defendant Waldron Duffy, nor was she bound by any actions of her attorney, applying California law to determine if Attorney Wartnick had actual or apparent authority to settle. (Pet. App. A.) Employer moved for reconsideration, claiming Mr. Wartnick constituted the widow's "representative" for purposes of section 33(g), and that claimant ratified the attorney's actions by her own inaction. ALJ Mapes considered and denied employer's motion. (Resp. App. A.)

Upon review, the Benefits Review Board affirmed ALJ's findings in all respects, and in addition found that based on the facts presented there was no settlement as a matter of law. (Pet. App. B.)

Employer again appealed, to the Ninth Circuit Court of Appeals, which affirmed the Board's decision in all respects. With regard to employer's argument that attorney Wartnick should be considered the widow's representative, the court said:

> [W]e hold that the Director's interpretation of 'representative' in § 933(g) to mean the 'legal representative of the deceased,' and to exclude legal counsel acting within the attorney-client relationship, is reasonable. Section 933(c) specifically defines the term 'representative' for purposes of § 933. Section 933(c) provides that 'legal representative of the deceased' is hereinafter referred to as 'representative.' 33 U.S.C. § 933(c); *see also Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539 (1932) (interpreting 'representative' in § 933(e) to mean 'representative of the deceased'). Moreover, only the Director's interpretation of 'representative' can be reconciled with the specific language of § 933(g)(1). Section 933(g)(1) refers to entering into settlements 'for an amount less than the compensation to which the person (or the person's representative) would be entitled. . . . ' As the Board pointed out, '[w]hile a legal representative of the decedent may receive compensation [for LHWCA claim], his attorney cannot.' *Stadtmiller*, 1994 WL 661134, at *5. Attorneys can recover attorney's fees, but they are not entitled to recover 'compensation,' defined in § 902(12) of the Act as 'the money allowance payable to an employee or his dependents. . . . ' " 33 U.S.C. § 902(12).

(Pet. App. A:6-7.)

The Court similarly rejected employer's claim that Mrs. Stadtmiller ratified her attorney's negotiations:

> The Board determined that the ALJ's finding that Stadtmiller had not ratified Wartnick's efforts was rational, given the evidence in the record. Ratification requires that the principal, knowing the facts, accepts the benefits of the agent's actions. *See Alvarado Community Hosp. v. Superior Court*, 219 Cal.Rptr. 52, 54-55 (1985). We agree with the Board that the ALJ's finding of no ratification was supported by substantial evidence in the form of testimony by Wartnick and Waldron's attorney that Stadtmiller refused to sign a release in favor of Waldron. Neither Stadtmiller's deposition nor her written declaration required the ALJ to infer that she was aware that Wartnick had dismissed her action against Waldron or that he had received a payment earmarked for her as a result of the dismissal. We join the Board in accepting the ALJ's reasoning that, even if Stadtmiller had known the details of Wartnick's conduct, it is doubtful that she would have realized this conduct amounted to a settlement or have understood enough about the legal consequences of a settlement to have knowingly ratified it. In sum, the Board properly applied to substantial evidence standard when it affirmed the ALJ's finding that Stadtmiller rejected rather than ratified any settlement agreement.

(Pet. App. A:10.)

IV. ARGUMENT

A. The Court's Statutory Interpretation Preserves, And Does Not Impair, Employer's Statutory Rights

Correct statutory construction of section 33(g) of the Act is at issue here. Competing interpretations are presented; one which unfairly benefits employer and needlessly harms injured workers and their families, versus one which protects the interests of both employers and longshore claimants. Resolution of this issue is controlled by this Court's mandate to liberally construe the LHWCA in favor of injured workers' recovery to further the Act's "humanitarian purpose," and to avoid "harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *accord Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 315-316 (1983).

Courts consistently acknowledge and abide by these precepts, following the LHWCA's "overall humanitarian policy" by requiring that "all doubtful questions of fact be resolved in favor of the injured employee." *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Force v. Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991). Examples of strict compliance with these edicts range from finding injury occurred in the course of employment, recognizing that "the Act must be construed liberally in favor of coverage to effectuate its broad, remedial purpose" *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1104 (9th Cir. 1982), to determining the identity of the single reliable employer where two contemporaneous employments might have caused the injury by deciding:

> When the evidence does not clearly indicate which of the covered employers who exposed

> him to injury the employee *last* worked for, *the purposes of the LHWCA are best served by assigning liability to the employer who is claimed against. Placing the burden of proof on an employer who has exposed the claimant to harm ensures that the claimant will recover for his injuries.*

General Ship Service v. Director, OWCP, 938 F.2d 960, 962 (9th Cir. 1991).

Interpretation of section 33(g) requires no less stringent adherence to the LHWCA's laudatory purposes. The Ninth Circuit's *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (1990) decision underscores the importance of considering the Act's "humanitarian purpose" in this area. Bethlehem Steel contended Mobley lost his rights to medical benefits by failing to *immediately* notify employer of a civil settlement. The *Mobley* court rejected this proposed section 33(g)(2) interpretation, following instead the Board's position that as long as the employer is afforded notice prior to making payments or the issuance of an award, the employer's lien and credit rights are sufficiently preserved. The court's conclusions are especially pertinent here:

> *Bethlehem's interpretation appears to serve no statutory purpose. The Board's interpretation, on the other hand, protects the interests of both the employer and the employee, thereby striking the delicate balance which the LHWCA strives to achieve. Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636, 103 S.Ct. 2045, 2052, 76 L.Ed 194 (1983). The Supreme Court has observed that the LHWCA is a humanitarian act and "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." (Citations).

Bethlehem Steel Corp. v. Mobley, supra, 920 F.2d 558, 561-562.

Force v. Director, OWCP, 938 F.2d 981 (9th Cir. 1991) also heeded the beneficial purposes of the LHWCA by compelling employers to bear the burden of proving a section 33(g) offset for civil settlements involving multiple parties. Holding that employers are only allowed credit for those portions of a third party settlement attributable to the longshore claimant, the court refused the suggestion that the widow bear the burden of apportionment, finding "this contravenes our case law and the purposes of LHWCA." *Id.* at p. 985. Citing the Act's "overall humanitarian policy," the court instead looked to the employer, explaining:

> Placing the burden of proof on employers is particularly appropriate in the context of Section 933(f) because the employer remains liable for the full amount of the statutory compensation absent a showing that the claimant has been compensated by a third party. *To ensure that the claimant receives his due, the employer must carry the burden of proving what is the claimant's portion of the group settlement.* Until the employer makes this showing, it is not entitled to an offset.

Id. at p. 985.

As seen in *Bethlehem Steel Corp.* and *Force,* protection of employers' section 33(g) rights can be preserved without harshly affecting the Act's mission to ensure needed compensation to longshore employees and their families. As often cited, section 33(g) "protects the employer against his employee accepting too little for his cause of action against a third party." *Banks v. Chicago Grain Trimmers,* 390 U.S. 459, 467 (1968). Yet that protection is not needed when the danger does not exist. The *Banks* court

agreed, refusing to interpret acceptance of a remitter as an unapproved settlement because the danger of the employee accepting too little was "not present when damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge." *Id.* at p. 467, citing *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960). The *Bell* court also rejected acceptance of a remitter as a compromise for section 33(g) purposes, remarking that the contrary interpretation is "unnecessarily harsh, and is not within the requirement of the Act's language, or its spirit and purpose." *Id.* at p. 781. The court reiterated the by now well worn principles that:

> *In the absence of language demanding it, a construction is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.* "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953), 74 S.Ct. 88, 92, 98 L.Ed. 5.

Bell v. O'Hearne, supra, 284 F.2d 777, 781.

Yet employer zealously seeks that forbidden windfall in this case, claiming an unauthorized civil settlement terminates the widow's benefits, *in the absence of* her acceptance of a settlement offer, settlement releases signed by claimant, or claimant's receipt of civil settlement monies. Mrs. Stadtmiller did not settle her civil case, did not give her attorney authorization to settle, and knew her LHWCA counsel instructed the civil counsel to *not* settle her case. Both the civil counsel and the civil defendant's counsel deny the case is settled, and confirm the civil defendant is still in the case. Employer has not been prejudiced and indeed retains all its rights. The

courts below did not err in refusing to unfairly and unnecessarily deprive an innocent widow of longshore benefits, provide an unconscionable windfall to the employer, and violate the "overall humanitarian policy" of the Act itself.

B. The Widow's Attorney Is Not Her "Representative" For Purposes of 33 U.S.C. Section 933(g)

This Court's *Cowart v. Nicklos Drilling*, 112 S.Ct. 2589 (1992) decision emphasized the first rule of statutory construction:

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.

Id. at 112 S.Ct. 2594.[3] Section 33 includes precisely such clarity when read as the integrated statutory scheme Congress intended rather than as isolated subdivisions. The statute addresses the *rights* of injured workers, their dependents, their "representative," and their employers, when third parties are sued on account of the injury. To avoid uncertainty, Congress confined the rights of the "representative" to the right of the "legal representative of the deceased," section 33(c). Yet employer would have this Court ignore Congress' clearly expressed intent, and

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[3] See, also, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) wherein the Supreme Court held that where "the statute is clear and ambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'. . . . ", and *Ingalls Shipbuilding, Inc. v. Director, OWCP* (1997) 97 C.D.O.S. 1077.

deem an attorney to be the person's "representative," expanding the term beyond its already provided definition, and desecrating the very purpose of the statute, which allots *rights to recovery*, of which an attorney has none. Examination of section 33 reveals these very basic flaws in employer's argument.

In its entirety, section 33 is an inextricably intertwined, remedial scheme designed to protect injured workers' rights to compensation and, on balance, to protect complying employers' rights to subrogation from third party tortfeasors. When read as an integrated whole, the statute outlines Congress' purpose. Subdivision 33(a) explains that the "person entitled to compensation," be it the injured worker or his dependents (i.e., the "claimant"), *need not elect* between LHWCA benefits and civil damages against a third party tortfeasor, but may seek both. Thus Congress encouraged third parties to provide a safe work place by permitting injured workers and their families to bring tort actions.

Subdivision 33(b) assigns the claimant's *right* to sue the third party tortfeasor to the employer, unless the injured worker (or dependent) sues the third party within six months of "*acceptance of compensation* under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Congress' automatic assignment of claimant's right to sue a responsible third party, to the employer who paid the compensation the claimant accepted, is plainly designed to insure that the claimant does not deprive the employer of his right to subrogation from the wrongdoer by failing to pursue a tort action. It gives the employer 90 days to initiate an action against the third party before the right to sue reverts back to the claimant.

Covering all circumstances, Congress' logical outline continues as section 33(c) provides that an employer's payment into the section 944 fund (or Special Fund), when "there is no person *entitled under this chapter to compensation for the death of an employee* which would otherwise be compensable" (section 944(c)), operates "as an assignment to the employer of all *right* of the legal representative of the deceased (*hereinafter referred to as the "representative"*) to recover damages against such third person. Thus Congress intended to assign to the employer not only the *rights* of the person presently "entitled to compensation" but the *right* of the deceased employee's survivors to unpaid compensation awarded to the employee prior to his death.[4]

Next, section 33(d) provides that the employer may sue or settle with the third party after such assignment. Section 33(e) divides the proceeds of an employer's successful exercise of the section 33(b) or (c) automatic assignment of the right to sue the third party, *and includes a share "to the person entitled to compensation or to the representative"* if there is money left over after the employer gets its share.

Section 33(f) relates back to the section 33(b) provision that assigns the tort action to the employer if the claimant accepts LHWCA compensation and fails to sue within 90 days, then returns the right to sue to the worker if the employer does not exercise this right to sue within 90 days. Thus, section 33(f) describes the process where a *"person entitled to compensation"* initiates proceedings

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[4] See section 903(d) of the Act which provides unpaid disability benefits shall be paid to the deceased employee's survivors.

against the third party. The employer remains liable for the difference between the claimant's benefit entitlement and the tort recovery, after reasonable attorneys' fees for the party who brought the tort case.

Section 33(g) provides further detail on the situation where the "person entitled to compensation" or the "representative," rather than the employer, brings a tort action. This provision protects the employer from the possibility that the claimant or "representative" might settle the third party action for less than the compensation the "person entitled to compensation" or *"representative"* may *"be entitled to* under this chapter," thereby depriving employer of its subrogation rights, by terminating "all *rights* to compensation and medical benefits" if such a settlement is executed by the "person entitled to compensation" or "representative."

Section 33(h) carries Congress' outline a practical step further. An employer's *insurer* stands in the employer's shoes with respect to subrogation rights and the automatic assignment of the right to use the third party.

Section 33(i) completes Congress' outline with its provision that there is no right to elect a tort action against the third party who caused the worker's injury if that third party is an officer or employee of the injured worker's employer.

Consideration of section 33 in its entirety thus leads to the inescapable conclusion that Congress could not, and did not, intend to include attorneys in the class of "representative." Section 33 apportions the *rights to recovery* to either civil or LHWCA compensation between the entities *entitled* to such compensation, be it the employer,

the injured employee, his dependents or the "legal representative of the deceased" if the employee dies without leaving persons entitled to compensation for his death. This Court recently affirmed this interpretation of section 33 in *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra,* 97 C.D.O.S. 1077. There, section 33(g)'s reference to "person entitled to compensation" did not include spouses of employees because the plain language of the statute applied only to persons *presently* entitled to compensation.

Attorneys, of course, do not possess any *rights* to LHWCA compensation.[5] Yet employer's interpretation of section 33(g) would confer on an attorney *rights* to compensation which the statute expressly forbids. If followed, section 33(g)(1) would state that if a civil settlement is entered into "for an amount less than the compensation to which the person (or the person's attorney) would be entitled under this chapter" the employer's liability for benefits absent written approval is terminated. On the other hand, if the term "representative" is defined *as required* by section 33(c) to mean the "legal representative of the deceased," the statute would provide that if a civil settlement is entered into "for an amount less than the compensation to which the person (or the legal representative of the deceased) would be entitled under this chapter," absent employer approval, the right to compensation is barred. This reading is completely consistent with the purpose and the function of

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[5] See section 914(a) which provides compensation must be paid directly to the person entitled thereto, and section 928(c) which requires attorneys' fees to be either paid by the employer/carrier, or be allowed as a lien upon compensation on an award, and in all cases must be approved before collection.

this section in allocating rights to compensation, does not violate statutory prohibition against attorney receipt of compensation, and provides the most logical interpretation of the contested term.

Basic rules of statutory construction also demand rejection of employer's argument. When a statute is clear and ambiguous, its plain language must be followed. *Federal Land Bank of New Orleans, L.A. v. Sear*, 109 F.2d 419 (5th Cir. 1940). So too, a statute must not be interpreted to render a portion of the statute meaningless or without effect. *Mountain States Tel. & Tel. Company v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Discarding section 33(c)'s express definition of the term 'representative' for later use in section 33(g) renders that language meaningless, and ignores the plain and precise language of the Act.

The *Aetna Life Insurance Company v. Moses*, 287 U.S. 530 (1932) decision provides guidance to the issue at hand. There, the deceased employee's widow, also the administratrix, accepted an LHWCA award of compensation, thus electing against a wrongful death action pursuant to then section 33(a) (which required an election by the person entitled to compensation to either receive compensation *or* recover damages against such third person).[6] That acceptance assigned to the employer the person's right to recover damages against a third person. The LHWCA insurer, payor of the benefits, thereafter brought suit as plaintiff in its own right, in the name of the widow "in her own right and as administratrix" and in the name of the employer. The court ruled the insurer

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[6] Section 33(a) was amended in 1959 by deleting the required election of remedies.

could pursue a third party action in this manner, notwithstanding the District of Columbia's death act which designated the administratrix as the only proper plaintiff in an action for wrongful death, an action not assignable at common law. The court recognized the LHWCA authorizes the employer to institute such a civil suit, stating that "any recovery in excess of the sums required to reimburse the employer and allow for compensation payable by him is to be paid to the representative of the deceased," citing section 33(e). *Aetna Life Ins. Co., supra,* 287 U.S. 530, 539. Importantly, section 33(e) does not explicitly state the excess will be paid to the "representative of the deceased", rather it only refers to the "person entitled to compensation or to the representative." Thus this Court has already implicitly followed section 33(c)'s directive to consider the term "representative" to "hereafter" mean "representative of the deceased", concluding the employer could enforce rights already vested in the employee or his personal representative, and emphasizing that "what is material is that the employer acquires the *legal rights* of the employee or the personal representative." *Aetna Life Ins. Co., supra,* 287 U.S. 530, 541 (emphasis added).

Employer's other arguments are similarly unpersuasive. Employer contends the Ninth Circuit's interpretation would exclude minors and incompetents because they would not be included in the definition of the term "representative" provided in section 33(c). Once again, the answer lies in the context of section 33 of a whole. Section 33 was intended to cover the rights of "persons entitled to compensation" and if there are no dependents of the deceased employee, that is no "person entitled to

compensation," to also cover the rights of the legal representative of the deceased. The term "person entitled to compensation" as used in section 33 necessarily includes all living dependents whether they are the employee, the dependent, or a minor or incompetent.

Whether the Act referred to attorneys as representatives in other sections is also irrelevant to interpretation of subsection 33(g) when Congress has specifically defined the term "representative" in that section. Congress directed the terms contained within section 33 to bear a particular meaning; that intent should be obeyed. The meaning of a particular word:

> may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances on which the language was employed. . . . ¶ It is not usual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.

Atlantic Cleaners & Dyers, Inc. v. United States, 289 U.S. 427, 433 (1932).

Perhaps cognizant of its distorted reading of section 33(c), employer also attempts to argue that the term "legal representative" includes an attorney, citing *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982). The *Graves'* court allowed an attorney for a quadriplegic to sign a claim form filed pursuant to the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671-80 on the plaintiff's behalf as his legal representative. The court looked to the language of the regulation itself to infer the

drafters intended to allow an attorney to sign as legal representative for the plaintiff. In stark contrast, the language of section 33(g) dissuades inclusion of attorneys as legal representatives. Section 33(g) does not deal with the mere signing of a claim form, but addresses the *substantive rights* of longshore claimants, more akin to the rights of a party addressed by Federal Rule of Civil Procedure 60(b). Rule 60(b) allows the court to "relieve a party or his legal representative from a final judgment, order, or proceeding. . . . Because Rule 60(b) affects the *substantive rights* of a party, courts have not allowed non-parties such as attorneys to benefit from the rule's lenient provisions. The *Mobay Chemical Company v. Hudson Foam Plastics Corp.*, 277 F.Supp. 413 (1967) court rebuffed an attorney's attempt to move for relief from orders of injunction, claiming that he was "a legal representative." The court concluded:

> The phrase "legal representative" as used in Rule 60(b) does not include legal counsel within the context of the attorney-client relationship, and, therefore, cannot provide a basis of standing for movant. A "legal representative" is one "who stands in the place and instead of" another, such as a heir at law. . . .

Mobay Chemical Company, supra, 227 F.Supp. 413, 416.

Following the district court's lead the circuit courts agreed, also finding the "legal representative" referred to in Rule 60(b) did not encompass attorneys, see *Western Steel Erection Company v. United States,* 424 F.2d 737 (10th Cir. 1970) and *Kem Mfg. Corp. v. Wilder,* 817 F.2d 1517 (11th Cir. 1987). The *Kem Mfg. Corp.* analysis is most fitting here:

> The cases make clear that the term legal representative was intended to reach only those individuals who were in a position tantamount to that of a party or whose legal rights were otherwise so intimately bound up with the parties that their rights were directly affected by the final judgment.

Id. at page 1520.

An attorney does not stand in the place of a party, but merely argues the party's cause. Only a legal representative in Rule 60(b) can be relieved from the effects of a judgment; an attorney cannot be because he is not affected by a judgment. Similarly, the representative in section 33(g) is referred to as a person entitled to compensation; again, a claimant is entitled to compensation but not his attorney. Because the statute deals with the rights of the longshore claimants, as does Rule 60(b), attorneys (without such rights) are necessarily excluded, see *Mobay, Kem Mfg. Corp.*

Finally, employer resorts to the purposes of section 33(g) in an attempt to bolster its position. Yet protection of employer's rights does not compel the distorted reading employer asserts. Employer's rights are not jeopardized if section 33(g) is limited to the actions of claimants and/or representatives of the estates of deceased claimants. Attorneys cannot settle a case without some action by their client, the receipt of monies, the execution of settlement documents, the granting of authority to settle a case, see *Blanton v. Womancare, Inc.*, 38 Cal.3d 396 (1958); *Chavez v. Director, OWCP*, 961 F.2d 1409 (9th Cir. 1992). Direct action required by the claimant is proper where settlement of the civil suit can bar the claimant's rights to compensation. The claimant is at risk, not his or her attorney.

The most egregious error employer commits is its claim of prejudice. As the courts below found, no settlement took place and employer has not suffered any prejudice. Mrs. Stadtmiller did not receive any civil monies, and when advised of the settlement offer refused it. Employer cannot claim credit pursuant to section 33(f) of the net amount recovered by the widow in the *absence of any recovery at all.* Employer's rights therefore remain inviolate. Mrs. Stadtmiller neither recovered too little nor too much; she has not recovered any amount at all. Employer can still withhold consent, and if an unauthorized settlement ultimately takes place, its liability is extinguished. Because no settlement occurred no prejudice has inured to employer, and its construction of the statute would merely benefit itself and unfairly prejudice the widow. When faced with two competing interpretations of section 33(g), this Court should affirm the interpretation which protects the interests of *both* the employer and the employee, "striking the delicate balance which the LHWCA strives to achieve". *Mobley, supra,* 920 F.2d 558, 561.

C. The Widow Is Not Bound By Unauthorized Conduct Of Her Attorney

Neither Mrs. Stadtmiller nor her attorney "settled" her civil case in violation of section 33(g). She withheld specific authorization to settle her case from attorney Wartnick; rejected an offer by the civil defendant; and did not receive civil settlement monies. (Resp. App. D:17, 19, 21-22; E:55-56.) Mr. Wartnick negotiated an anticipated settlement with civil defendant Waldron Duffy, agreed to recommend a civil settlement offer from Waldron Duffy to claimant and agreed to dismiss Waldron Duffy from

the civil action if claimant Stadtmiller accepted the civil offer. (Resp. App. E:54-56.) While Mr. Wartnick mistakenly allowed a dismissal with prejudice to be filed, and held monies representing the offer in trust while waiting acceptance or rejection from Mrs. Stadtmiller, upon rejection of the offer he returned the monies to defendant Waldron Duffy, and obtained a vacation of the dismissal as per his agreement with counsel for Waldron Duffy. (Resp. App. E:56.) The actions by attorney Wartnick clearly did not constitute settlement of the civil action. However, whatever actions attorney Wartnick did or did not take, and the legal ramifications resulting therefrom, are not binding upon Mrs. Stadtmiller.

Resolution of whether a client is bound by her attorney's actions is resolved by principles of agency law governing attorney-client relationships. But which law to apply, state or federal? The trial court concluded that California law should apply, explaining that:

> When it is recognized that the primary purpose of subsection 33(g) is to preclude claimants from entering into settlement agreements with third-party tortfeasors that might adversely affect the interest of employers and their insurers, it is (sic) becomes clear that the appropriate standard under section 33 for determining when a claimant should be bound by the settlement-related actions of the claimant's attorney is the standard that would be applied by the court having jurisdiction over the civil action against the third-party tortfeasor.
>
> In this case, the claimant's civil action is under the jurisdiction of the state courts of California and therefore California state law has to be applied to determine whether the settlement-

> related actions of Mr. Wartnick are binding on the claimant.

(Pet. App. C:45-46.)

Employer did not attack the findings of the trial court in its motion for reconsideration, nor in its petition for review before the Benefits Review Board. Indeed, employer relied solely upon California law in its argument to the Board that attorney Wartnick's actions are binding on Mrs. Stadtmiller. Yet before the Ninth Circuit employer argued federal law should apply, because a federal statute is involved. Having denied the Benefits Review Board the opportunity to pass on this issue, employer cannot be heard on this point. See *Marathon Oil Company v. United States*, 807 F.2d 759, 767 (9th Cir. 1986) ("As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time.").

Moreover, the courts below correctly applied California law. In resolving the issue of the scope of an attorney's authority to settle a case, federal courts consistently look to the law of the state in which the attorney practices, see, e.g., *Capital Dredge & Dock v. City of Detroit*, 800 F.2d 525 (6th Cir. 1986) (applying Michigan law in diversity action to issue of apparent authority of attorney to settle case), *Lockette v. Greyhound Lines, Inc.*, 817 F.2d 1182 (5th Cir. 1987), (concluding pursuant to Louisiana law that attorney lack authority to settle a case) and *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143 (9th Cir. 1977). There, the court addressed the exact issue present herein, the nature and scope of an attorney's authority to settle a case. Importantly, the case involved an action brought pursuant to a federal statute, the Civil Rights Act of 1964, 42 U.S.C. section 2000e. The court applied California law

in holding that "an attorney has no authority, either actual or implied, to settle an action without the express permission of his client." (*Id.* at page 1145.) The court remanded the case to the district court for further factual inquiry as to whether the plaintiffs had authorized their attorney to settle the case or dismiss the action at issue. See also, *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772 (9th Cir. 1989) which applied California law to reject a claimed oral agreement in breach of contract action, covered by federal statute 17 U.S.C. section 204(a) which required contracts transferring an exclusive license in a copyrighted work be in writing. The court found the defendant's attorney

> could not memorialize the agreement between the parties even if he intended to do so, absent Pinckney's signature on the letter or some express authorization from her. *See, e.g., Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 407, 692 P.2d 645, 652, 212 Cal.Rptr. 151, 158 (1985).

Valente-Kritzer Video v. Pinckney, supra, 881 F.2d 772, 775.

The Ninth Circuit's rejection of employer's argument here provides the correct analysis:

> "Employer contends that Federal law applies, and that under Federal law, a client is bound by the acts of her attorney. The instances in which the courts are authorized to fashion federal common law are restricted to "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted). Neither category is relevant here. *See Slavin v. Commissioner*, 932 F.2d 598, 601 (7th Cir. 1991) ('Normally the authority of an agent (a lawyer is just a specialized agent)

> derives from state law; that the substantive dispute concerns federal law does not matter.') Moreover, under federal law, '[w]hile there is a presumption that a settlement entered into by an attorney has been authorized by the attorney's client, rebuttal of the presumption renders any purported settlement ineffective.' *Michaud v. Michaud*, 932 F.2d 77, 80 (1st Cir. 1991).

(Pet. App. A:8-9.)

The *Harrop* and *Pinckney* courts correctly recognized California law demands specific authorization by a client to settle an action. "The law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation." *Blanton v. Womancare, Inc., supra,* 38 Cal.3d 396, 404 citing *Whittier Union High School District v. Superior Court,* 66 Cal.App.3d 504, 508 (1977). The *Blanton* court addressed the binding effect of plaintiff's attorney's agreement to resolve the matter through arbitration. Blanton did not consent to the agreement and repudiated it when she learned of it. The court found that in the absence of "express authority, it is established that an attorney does not have implied plenary authority to enter into contracts on behalf of his client . . . and, that authority is not enlarged simply because the contract is entered into in conjunction with pending litigation." *Id.* at page 407. (*See also Levy v. Superior Court* (1995) 10 Cal.4th 578, 896 P.2d 171 which held the signature of a party's attorney is insufficient to create an enforceable settlement in California.)

In attempted support of its position, employer misstates California law, contending that a principal or client

is bound by the acts of her agent or attorney, citing *Gagnon Company, Inc. v. Nevada Desert Inn*, 45 Cal.2d 448 (1955). The *Gagnon* case involved a stockholder suit against the Nevada Desert Inn, and its director and officer Burke, for fraud. Burke raised the defense of res judicata, claiming a prior valid and final Nevada judgment resolved an action concerning substantially the same charges. Plaintiffs in the *Gagnon* action attacked the Nevada judgment, arguing the attorney who agreed to dismiss the Inn's action with prejudice lacked authority. The court upheld the trial court's finding of authority based on a rebuttable presumption of authority. This presumption arose from the court's reconciliation of early cases holding the general authority of an attorney is sufficient to empower him to effect a renunciation of a client's substantive right with "the established principle that the implied general authority of an attorney does not include any power or authority to dispose of the client's substantive rights. . . . " *Id.* at page 460. The court reiterated the general rule that:

> In civil litigation, the attorney, as the client's agent, and in the absence of fraud, has authority to bind his client in all matters pertaining to the regular conduct of a case. . . . In the absence of such special instructions, the conduct and management of the action is entrusted to the attorney's judgment; he decides what should be contested, what points should be taken, and what should be abandoned. *This authority is, however, subject to the qualification that an attorney ordinarily does not have implied authority to do an act which would effect the surrender or loss of a client's substantial rights, for the client determines "the objectives to be attended."*

Id. at page 460, citing 6 Cal.Jur.2d, Attorneys at Law § 156.

Blanton properly distinguished *Gagnon* by noting the matter involved a collateral attack on a judgment. Of course, this matter does not involve a collateral attack on a final judgment, there being no judgment nor even a valid dismissal, but rather defendant's unsupported assertion that certain acts by attorney Wartnick bind the claimant to an unauthorized settlement. *Blanton* rejects this proposition, allowing only binding effect to *authorized* actions. Here, both the widow and her attorney agreed *he lacked authority* to settle her case, and had been instructed to *not* settle her case. (Resp. App. D:19, 21-22; E:26-27.) That evidence rebuts any presumption of authority. In the absence of such authority, attorney Wartnick's actions cannot have any effect on Mrs. Stadtmiller's case.

Finally, employer argues Mrs. Stadtmiller somehow ratified her attorney's unauthorized actions by her own inaction. Ratification of unauthorized acts occurs when the principal, knowing the facts, accepts the benefits of the agent's acts, see *Fidelity & Casualty Company v. Abraham*, 70 Cal.App.2d 776, 783 (1945); *Alvarado Community Hospital v. Superior Court of San Diego*, 173 Cal.App.3d 476, 481 (1958). Employer did not, and could not, establish that Mrs. Stadtmiller knew of the settlement negotiations between attorneys Wartnick and Jones, the dismissal of Waldron Duffy, nor that monies had been deposited in Wartnick's trust fund. Indeed, her actions argue against ratification. Once informed of the offer she rejected it. And, upon rejection her attorney returned the settlement monies, and obtained a vacation of the dismissal. Indeed, the facts of this case are more analogous

to those in *Whittier Union High School District v. Superior Court*, 66 Cal.App.3d 504 (1977), where the court vacated a dismissal of the action with prejudice due to the attorney's lack of authority. The court's reasoning is equally applicable here:

> Quite simply, the controlling question is whether Pierovich had any authority to dismiss plaintiffs' action without their knowledge and consent. If he wholly lacked power to dismiss the cause and acted beyond the scope of his authority in dismissing his clients' complaint, his action remained voidable for an indeterminate period, and his clients could vacate the unauthorized dismissal within a reasonable time after learning of it, regardless of the time limitations in section 473. . . . Because the facts are undisputed that Pierovich's dismissal was wholly unauthorized and entered without any knowledge and consent of plaintiffs, the dismissal may be vacated by the court at any time.

Id. at pp. 507-508.

Employer, though, compares Mrs. Stadtmiller with plaintiff Blanton, who fired her attorney. Of course, the fact that the plaintiff in *Blanton* fired her attorney helped the court to reject ratification. But, the *Blanton* court did not *require* termination, it simply used that fact in arriving at its decision. Sufficient facts are presented here to also deny ratification. Here, Mrs. Stadtmiller refused to sign settlement releases and rejected the offer. Attorney Wartnick conveyed the rejection to Waldron Duffy, returned the monies, and obtained vacation of the dismissal. No further action was required.

V. CONCLUSION

Mrs. Stadtmiller has not received one penny of civil settlement monies. Yet she is threatened with termination of benefits. Clearly, she is the innocent victim in this case, not employer. If a settlement does take place, employer will receive credit. But here, employer seeks to terminate benefits before the existence of an executed civil settlement. This is not the situation Congress considered when it enacted section 33(g), and it most assuredly did not seek to provide employer with an avenue to terminate necessary longshore benefits when the claimant has not benefited from any purported civil settlement. The decisions below followed relevant federal law, and are affirmed by this Court's decisions in *Cowart* and *Ingalls*. This Court's review is unnecessary and the Petition For Writ of Certiorari should be denied.

DATED: March 24, 1997

Respectfully submitted,

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APPENDIX A

U.S. Department of Labor

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In the Matter of BEATRICE STADTMILLER (widow of Delbert Stadtmiller), Claimant, v. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Insurer.	Case No. 92-LHC-2755 OWCP No. 13-87454

ORDER DENYING MOTION FOR RECONSIDERATION

On November 8, 1993, the employer/insurer (hereinafter "the employer") in the above-captioned matter filed a timely petition seeking reconsideration of an order denying the employer's motion for rescission of certain previously-approved stipulations.[1] The petition for

[1] Under the provisions of 20 C.F.R. §802.206(b)(1) petitions for reconsideration must be filed within 10 days after the decision in issue was filed in the Office of the District Director. In this case the District director has certified that the order in question was filed and served on October 22, 1993. Thus, it may

reconsideration contains two basic contentions: (1) that as used in some subsection 33(g) of the Longshore and Harbor Workers' Compensation Act ("the Act"), the term "representative" includes attorneys who represent claimants in Longshore Act proceedings, and (2) that the claimant knew that her attorney had entered into a settlement of her tort claim against Waldron Duffy and ratified that action by silence. For the following reasons, I find these contentions to be without merit.

A. Definition of "Representative"

The employer's contention that the term."representative" in subsection 33(g) includes attorneys is based on the observation that other sections of the Act and other laws enacted by Congress use the term "representative" to refer to attorneys. This argument is not persuasive. While it is true that the term "representative" is sometimes used in the Longshore Act and other statutes to refer to attorneys, there are at least two strong reasons for

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appear that the employer's petition is not timely. However, the postmark on the envelope in which the order was served shows that in fact the order was not mailed until October 27, 1993. Therefore the 10-day period did not begin to run until October 27 and did not terminate until Saturday, November 6. *See Nealson v. California Stevedoring & Ballast Co.*, 966 F.2d 966 (9th Cir. 1993). When the tenth day after service of an order falls on a Saturday, Sunday or holiday, the end of the 10-day period is extended until the next business day. 20 C.F.R. §802.221(a). Thus, since the tenth day after October 27 fell on a Saturday, the employer met the deadline by filing its petition on Monday, November 8.

finding that Congress had no such intention when it enacted section 33.

First, as explained in the prior order, subsection 33(c) of the Act explicitly states that as used in section 33, the term "representative" shall mean the "legal representative" of a decedent. Since statutory terms should be given their ordinary meaning and since the term "legal representative" is a term that ordinarily does not include attorneys, Congress thereby indicated that it did not intend for the term "representative" to be interpreted as including attorneys.[2]

Secondly, it is clear from the context of the second reference to the term "representative" in subsection 33(g) that the term was not intended to include attorneys. This second reference to the term "representative" provides that if a person or the person's representative enters into a settlement with a third person "for an amount less than *the compensation to which the person (or the person's representative) would be entitled* under this Act," recovery under the Act will be barred unless prior written approval for the settlement had been obtained from the appropriate employer and insurer (emphasis added). If this particular

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[2] It is noted that the employer has cited one decision in which the term "legal representative" as used in regulations adopted under the Federal Tort Claims Act was interpreted from its context as applying to attorneys. *See Graves v. United States*, 692 F.2d 71, 74 (9th Cir. 1982). However, this is not how the term is ordinarily used in insurance policies and statutes comparable to subsection 33(g). *See*, e.g., *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987); *Mobay Chemical Co. v. Hudson Foam Plastics Corp.*, 277 F.2d 413, 416 (S.D N Y. 1967).

segment of subsection 33(g) were interpreted as referring to attorneys, the provision would make no sense, since, unlike claimants, attorneys for claimants are only entitled to recover attorney's fees under section 28 and are never entitled to recover "compensation," a term that is defined in subsection 2(12) of the Act as meaning "the money allowance payable to an employee or to his dependents. . . . "

B. Knowledge of Settlement

The employer also contends that contrary to the findings in the prior order, the claimant was aware that her attorney had settled her claim against Waldron Duffy and had in effect ratified that settlement by failing to take any affirmative action to rectify the situation. As evidence of the claimant's knowledge, the employer relies on the claimant's March 8, 1993 declaration. In that declaration the claimant in effect represented declaration she had not authorized her attorney to settle her civil claim, had not signed any settlement papers, and had not received any settlement monies It thus reflects some knowledge by the claimant of allegations that her case against Waldron Duffy had been settled.

However, the claimant's declaration by itself is not sufficient to show that she was fully informed of the unauthorized actions of her attorney. In particular, the declaration does not indicate any awareness of the key details of the alleged settlement, such as the fact that her attorney had dismissed her civil suit against Waldron Duffy with prejudice or the fact that he had received $4500 for such dismissal. Although it is possible that the

claimant may have been aware from the pleadings filed by the employer that her attorney had dismissed her suit against Waldron Duffy with prejudice, it has not been shown that she in fact read those pleadings, or, even understood them, if she did read them. Likewise, there has been no convincing showing that the claimant was aware of the amount of the alleged settlement at the time she filed her declaration. Indeed, as noted in the prior order, it is questionable whether anyone ever informed the claimant of the amount of the alleged settlement.

It is also important to recognize that even if the claimant had in fact known of the details of her attorney's conduct, it is doubtful that she would have realized that this conduct amounted to an actual settlement. The legal impact of her attorney's conduct is a complicated matter which a person lacking legal training would be unlikely to fathom. Although the claimant was represented by two different law firms, attorneys at both of these law firms were vigorously contending that no settlement had actually occurred and that the interactions of Mr. Wartnick with Waldron Duffy constituted nothing more than an "offer." The claimant undoubtedly relied on these contentions, and it is thus highly unlikely that she ever understood enough about the legal consequences of Mr. Wartnick's conduct to have knowingly ratified that conduct.

Finally, even if it could be concluded that the claimant had been fully informed of the unauthorized actions of her attorney and understood the legal significance of those actions, such a conclusion by itself would not be sufficient to show that the claimant had ratified the unauthorized acts of her attorney. Rather, ratification

could not have occurred unless that claimant took some action to demonstrate her concurrence in the unauthorized actions. The record in this case contains no evidence of such a concurrence. Indeed, the evidence is to the contrary. For example, the declaration the claimant filed in March of 1993 implied an intention to disavow any unauthorized acts of which she may have been aware. Likewise, the testimony of Mr. Wartnick and the attorney for Waldron Duffy indicates that if the claimant was, in fact, informed of the amount of the proposed settlement, she refused to sign the settlement papers, thereby expressly rejecting the alleged settlement.[3] Although the employer's petition for reconsideration suggests that the claimant could have acted more affirmatively to repudiate the actions of her attorney, the employer has failed to cite a single decision in which a court required any more affirmative form of repudiation than has been shown in this case.

Accordingly, I find that the initial decision on this matter was correct and that it should not be revised in any way.

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[3] As previously noted, it is questionable if the claimant's attorney ever actually did inform the claimant of the amount of the alleged settlement or otherwise present the matter to her for ratification.

ORDER

The employer's motion for reconsideration is denied.

/s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

DATE: Nov. 26, 1993
San Francisco, California

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing compensation order was filed in the office of the District Director, 13th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each on November 30, 1993.

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A copy was also mailed by regular mail to the following:

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In the Matter of BEATRICE STADTMILLER (widow of Delbert Stadtmiller), Claimant, v. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Insurer.	Case No. 92-LHC-2755 OWCP No. 13-87454

ORDER DENYING MOTION
FOR RECONSIDERATION-ERRATA

Notice is hereby given that the citation to *Mobay Chemical Co. v. Hudson Foam Plastics Corp.* in footnote 2 of the Order Denying Motion for Reconsideration signed on November 26, 1993, is incorrect. The correct citation is 277 F. Supp. 413, 416 (S.D. N.Y. 1967).

/s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

DATE: Nov. 29, 1993
San Francisco, California

APPENDIX B

KAZAN, McCLAIN, EDISES & SIMON

A Professional Law Corporation

171 Twelfth Street, Third Floor
Oakland, California 94607
(510) 465-7728 • (510) 893-7211
FAX: (510) 835-4913

[Balance Of Letterhead Omitted In Printing]

April 16, 1992

Harry Wartnick, Esq.
Cartwright, Slobodin, Bokelman, Borowsky,
Wartnick, Moore & Harris, Inc.
101 California Street, Suite 2600
San Francisco, California 94111

Re: *Beatrice Stadtmiller (Delbert, deceased)*

Dear Harry:

I am representing Mrs. Beatrice Stadtmiller in a longshore compensation case. I attended a conference on her case on April 15, 1992, and there I was able to persuade the defendant to commence longshore compensation benefits to her. I am informed and believe that Mrs. Stadtmiller will begin receiving compensation benefits next week.

Our office referred the Stadtmiller civil case to you. At your earliest convenience, please provide me with a copy of the civil complaint and I will see that it is served on all the defendants in Mrs. Stadtmiller's compensation cases. Also, since Mrs. Stadtmiller is receiving longshore

compensation payments, she cannot accept any civil settlements without the consent of the longshore compensation insurance carrier. Therefore, if you receive any civil settlement offers for Mrs. Stadtmiller, please advise and I will attempt to obtain the consent of Industrial Indemnity, the longshore compensation carrier.

Thank you for your anticipated attention. I look forward to hearing from you.

Very truly yours,

KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation

By: _____
VICTORIA EDISES

VE: 72957

KAZAN, McCLAIN, EDISES & SIMON

A Professional Law Corporation

171 Twelfth Street, Third Floor
Oakland, California 94607
(510) 465-7728 • (510) 893-7211
FAX: (510) 835-4913

[Balance Of Letterhead Omitted In Printing]

June 9, 1992

Harry Wartnick, Esq.
Cartwright, Slobodin, Bokelman, Borowsky,
Wartnick, Moore & Harris, Inc.
101 California Street, Suite 2600
San Francisco, California 94111

Re: *Beatrice Stadtmiller (Delbert, deceased)*

Dear Mr. Wartnick:

Industrial Indemnity has commenced payment of nominal longshore compensation benefits to Beatrice Stadtmiller. Therefore, her civil case cannot be settled without Industrial Indemnity's consent. If you receive any offers to settle Mrs. Stadtmiller's civil case, please advise me and I will attempt to obtain Industrial Indemnity's consent.

Very truly yours,

KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation

By: _____
VICTORIA EDISES

VE: 73030

APPENDIX C

HARRY F. WARTNICK, ESQ., State Bar No. 54761
MADELYN J. CHABER, ESQ., State Bar No. 88950
STEVEN M. HAROWITZ, ESQ., State Bar No. 71117
AUDREY A. SMITH, ESQ., State Bar No. 118411
NIROMI L. WIJEWANTHA, ESQ., State Bar No. 154216
CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY,
WARTNICK, MOORE & HARRIS, INC.
101 California Street, 26th Floor
San Francisco, CA 94111
(415) 433-0440

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEATRICE STADTMILLER, Plaintiff, vs. FIBREBOARD CORPORATION, et al., Defendants.	No. 692289-2 STIPULATION

IT IS HEREBY STIPULATED by and between plaintiff BEATRICE STADTMILLER and defendant WALDRON DUFFY, INC., that the Dismissal heretofore filed in this action on September 11, 1992, as to defendant WALDRON DUFFY, INC., be vacated and set aside.

Dated: May 20, 1993

For Plaintiff:

CARTWRIGHT, SLOBODIN, BOKELMAN, BOROWSKY, WARTNICK, MOORE & HARRIS, INC.

BY: /s/ Harry Wartnick

Dated: May 20, 1993

For Defendant WALDRON DUFFY, INC.:

ARCHER, McCOMAS & LAGESON

BY: /s/ Roderick D. Jones

ORDER

Good cause appearing therefore,

IT IS HEREBY ORDERED that the Dismissal of defendant WALDRON DUFFY, INC., filed on September 11, 1992, is vacated.

Dated: May ___, 1993

JUDGE OF THE SUPERIOR COURT

Stipulation/Order Re Setting Aside Dismissal
Stadtmiller v. Fibreboard Corporation, et al., Alameda Superior Court No. 692289-2

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER, Claimant, vs. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Carrier.	OALJ Case No. 92-LHC-2755 OWCP Case No 13-87454

DEPOSITION OF BEATRICE STADTMILLER
TUESDAY, MAY 25, 1993

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* * *

[p. 10] MS. EDISES: No. You did it right. You did it right.

The court reporter is taking down everything that we say. Sometimes when the person – when we are here and we are talking about the same thing, and we all know we are talking about the same thing, we don't have to explain. But sometimes a stranger will read the transcript and he won't know what we are talking about because he wasn't here. So that is why Randy wants to have it put in a certain way.

THE WITNESS: All right.

MR. POPPY: Q. Approximately when did you substitute out Ms. Edises' firm from the civil action?

A. In '92.

Q. They no longer represent you in that action, Mrs. Edises' firm?

A. Not in the civil action.

Q. And the Cartwright firm, do they still represent you in the civil action?

A. Yes.

Q. That was my impression as well.

Who of the Cartwright firm have you spoken to: I know we are kind of getting into a –

MS. EDISES: We are not going to let you go into anything that is privileged.

MR. POPPY: I understand that.

* * *

[p. 20] since, say, September of last year, anything that's gone on?

MS. EDISES: You mean other than the settlement offer?

MR. POPPY: Well, we don't know when that was. That is why I am asking the question.

MS. EDISES: Okay.

THE WITNESS: I have no idea of what's gone on in that suit.

MR. POPPY: Q. Can you place that phone call in time to any extent? Do you recall if it happened in the spring, in the summer, fall?

A. No.

Q. Have you ever received any money in relation to the civil lawsuit?

A. No.

Q. Have you ever authorized dismissing any defendants for any reason in your civil lawsuit?

A. No.

MS. EDISES: Go ahead.

MR. POPPY: Q. And the Cartwright firm is still representing you in that lawsuit?

A. Are they still?

Q. Yes.

A. Yes.

MR. POPPY: Those are all the question I have [p. 21] of you. Thank you very much.

EXAMINATION BY MS. EDISES

MS. EDISES: Q. Mrs. Stadtmiller, just let me ask a few questions in the event we do not call you back to the trial to testify. Okay?

A. Okay.

Q. When you hired or allowed Madelyne and Harry to take over your lawsuit, was it your expectation that they would be allowed to decide who to sue?

A. Yes.

Q. As a caveat to that, is it your expectation that if somebody doesn't belong in the suit or they don't need to be in there that Madelyne and Harry can get rid of them from the case?

A. Well, sure.

Q. And we have talked a lot about settlement. Do you believe that Madelyne and Harry can settle your case without telling you about it?

A. No way.

Q. You are sure about that?

A. Well, sure. Because I was the one that started it, I guess.

Q. Okay. Do you expect that if there is a settlement you will have to sign something saying that you have [p. 22] settled; is that your expectation?

A. That's right. That's right.

Q. All right. And –

A. I and the children.

Q. Okay. You are not the only person involved in the suit?

A. No.

Q. So in order to make a settlement you and the children have to sign a piece of paper authorizing the settlement? Is that what you were talking about?

A. A legal paper.

Q. Mrs. Stadtmiller, you are aware that Mr. Wartnick has been told not to settle your civil case without a consent of Industrial Indemnity?

A. Yes, he has been told.

MR. POPPY: Objection for the record. The proper foundation has not been laid.

MS. EDISES: Q. And this is what you signed, wasn't it, that you have not authorized Harry and Madelyne to settle your civil lawsuit in the absence of obtaining consent from Industrial Indemnity?

A. That is what you told me.

Q. Are you aware that written instructions have been provided to Madelyne and Harry that they are not to enter into any settlement without the consent of Industrial Indemnity?

[p. 23] A. I believe you affirmed this for me.

Q. And so the record is absolutely clear, those written instructions came from me, did they not?

A. Yes.

Q. And we discussed those written instructions before I sent them, did we not?

A. Yes. That's why I called you.

MS. EDISES: Thank you very much.

MR. POPPY: I have some more questions about this written instructions.

RE-EXAMINATION BY MR. POPPY

MR. POPPY: Q. When were these written instructions sent to the Cartwright office?

A. Well –

MS. EDISES: If you know, say, but don't guess on it. Don't guess on dates.

THE WITNESS: I did not –

MS. EDISES: Do you know the date?

THE WITNESS: No.

MR. POPPY: Let's go off the record a second.

(Discussion off the record.)

MR. POPPY: Back on the record.

Q. When did you discuss any written instructions that would be sent to the Cartwright firm from Ms. Edises?

Defendant's Exhibit A

Victoria Edises, Esq.
KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation
171 Twelfth Street, Third Floor
Oakland, California 94706
Telephone: (510) 465-7728

Attorneys for Claimant
BEATRICE STADTMILLER

BEATRICE STADTMILLER, (Widow of DELBERT STADTMILLER), Claimant, vs. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Carrier.	OALJ Case No. 92-LHC-2755 OWCP Case No. 13-87454 DECLARATION OF BEATRICE STADTMILLER

I, BEATRICE STADTMILLER, declare the following under penalty of perjury:

1. I am the claimant in the above-captioned case.

2. I have also filed or caused to be filed on my behalf a lawsuit against the manufacturers and suppliers of asbestos.

3. I have not received any money as a result of the filing of a civil lawsuit against the asbestos manufacturers and suppliers.

4. I have not authorized my attorneys to settle my civil lawsuit against any asbestos manufacturer in the absence of obtaining consent from INDUSTRIAL INDEMNITY.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8 day of March, 1993, at Fort Bragg, California.

DATED: 3/8/93

/s/ Beatrice Stadtmiller
BEATRICE STADTMILLER

APPENDIX E

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	CALJ NO: 92-LHC-2755
DELBERT STADTMILLER (Deceased) and BEATRICE STADTMILLER (Widow),	OWCP NO: 13-87454
Claimants,	
v.	
MALLOTT & PETERSON and INDUSTRIAL INDEMNITY COMPANY,	
Defendants.	

Tuesday
June 22, 1993

211 Main Street,
Suite 600
San Francisco, California

The above-entitled matter came on for hearing, pursuant to notice, at 9:05 a.m.

BEFORE: HONORABLE PAUL A. MAPES
Administrative Law Judge

[p. 2] APPEARANCES

On behalf of the Claimants:

VICTORIA EDISES, Esq.
Kazan, McClain, Edises & Simon
171 12th Street, Suite 300
Oakland, California 94607

On behalf of the Defendants:

ROGER A. LEVY, Esq.
Laughlin, Falbo, Levy & Moresi
Two Embarcadero Center, 5th Floor
San Francisco, California 94111-3823

On behalf of Harry Wartnick (Witness):

Stephen M. Tigerman, Esq.
CARTWRIGHT, SLOBODIN, BOKELMAN,
BOROWSKY, WARTNICK, MOORE
& HARRIS, INC.
101 California Street, 26th Floor
San Francisco, California 94111

* * *

[p. 34] (Off the record to change tapes.)

JUDGE MAPES: If you be seated right there. If you would please raise your right hand?

Whereupon,

HARRY WARTNICK

was called as a witness herein and, after having been duly sworn, was examined and testified as follows:

JUDGE MAPES: Fine.

MR. TIGERMAN: Your Honor, I'm Mr. Wartnick's lawyer. Would you like me to make an appearance?

JUDGE MAPES: Sure.

MR. TIGERMAN: My name is Stephen Tigerman of the law firm of Cartwright, Slobodin, and I'm appearing as Mr. Wartnick's attorney.

JUDGE MAPES: Okay. Thank you.

MR. LEVY: I'm not clear of Mr. Tigerman's role in the proceedings. I don't have any objection to him being here clearly, but I think maybe we should lay the groundwork in advance as to what participation he'll have in the proceedings.

JUDGE MAPES: Well, you're representing the witness; is that correct?

MR. TIGERMAN: That is correct, Your Honor, particularly with respect to any endeavors to – by either counsel to violate privilege either belonging to our clients

* * *

[p. 48] he's just concerned about whether the fact – whether there was a settlement or not.

MR. TIGERMAN: Well, let's – okay. Well, why don't we just go ahead and take it and see where it goes.

JUDGE MAPES: Okay. Why don't we do it a question at a time then?

MR. LEVY: Okay.

JUDGE MAPES: Proceed, Mr. Levy.

MR. LEVY: Thank you.

BY MR. LEVY:

Q Is it true that you or your office represents Beatrice Stadtmiller in a civil matter against various defendants relating to an asbestos injury allegedly sustained by her husband?

A Yes.

Q Okay. And to the best of your estimate or recollection, when did you become involved in your representation of Ms. Stadtmiller?

A Probably spring of 1992, approximately.

Q And that representation resulted as a result of a referral from the Kazan office?

A That's correct.

Q Now as part of the litigation in this case, you were asked to and in fact prepared a declaration dated March 19th, 1993, which is in the Defendant exhibit packet [p. 49] as Exhibit B, and is not contained in the Claimant's exhibit packet, but do you recall that declaration?

A I recall it, yes.

Q Have you seen it recently?

A No, I haven't.

Q Do you want to take a look?

A Yes, I'd like to.

MS. EDISES: I have it for you.

THE WITNESS: Thank you. All right.

BY MR. LEVY:

Q Okay. If we could focus on No. 2, sir, it indicates that you have never had authority from Mrs. Stadtmiller to settle any part of her civil case?

A Yes, sir.

Q And can you tell me what you meant in your declaration by had authority to – from Ms. Stadtmiller to settle any part of her civil case?

A I think it's fairly straightforward. I can't settle her case without her approval.

Q She never gave you specific authority to settle with any of the defendants, is that what you refer –

A That is correct.

Q And did she – and again, I'm talking about some kind of communication, whether written or verbal; she never gave you a written or verbal communication to settle any of [p. 50] her case against any defendant specifically?

A I'm confused with the negatives in your question.

Q Um –

A She never gave me permission to settle her case against anybody.

Q Okay. And my next question was going to be, I take it that she never gave you general authority to settle with anybody or bodies?

A She – that is correct.

Q Okay. Now in point No. 3, you indicate civil settlement papers have never been sent to Beatrice Stadtmiller from my office, and Mrs. Stadtmiller has never signed any civil settlement papers.

What do you mean by civil settlement papers?

A Releases.

Q Okay. So we can substitute the word "releases" for civil settlement papers?

A Yes.

Q Okay. Now point No. 5 indicates that your office has never forwarded any monies representing settlement of the civil case to Ms. Stadtmiller, and "I have no knowledge of any civil settlement monies received by Beatrice Stadtmiller."

And let's focus on the word "received" as it applies to Beatrice Stadtmiller and your understanding of [p. 51] the word "received" in that part of your declaration.

A To my knowledge, it –

MS. EDISES: Objection. There's no question pending.

THE WITNESS: All right.

BY MR. LEVY:

Q Was is your understanding the use of the word "received" in point 5 of your declaration?

A That Beatrice Stadtmiller has never received any money.

Q Okay. If I can go into this a little further, do you mean to say that she never received in her hands a check that represented proceeds from a civil defendant?

A Yes.

Q Okay. And in point 4 of your declaration, sir, you indicate you have not entered into any civil settlements with any civil defendant, and can you tell me on what basis you make that conclusion?

A We haven't. I don't know what else I could say to clarify that.

Q Now point 6, you indicate that last year, and that would have been 1992, you negotiated a group of 60 cases with civil defendant, Waldron, Duffy.

Now you use the word "60," and I don't want to be picky, but if I asked you at this point if it might have [p. 52] really been 59, would you have a strong objection with me?

A No, there may have been one case that we talked about and that we decided to defer discussions on. But we're talking the same group of cases.

Q All right. And there wasn't a group of 60 and a group of 59?

A No, there was not.

Q Okay. Now going on in paragraph 6, you indicate that – it looks like it's about the fourth sentence, "Similarly, I have not accepted the proposed settlement with Waldron, Duffy on behalf of Beatrice Stadtmiller," and I want to know what you mean by "I have not accepted the proposed settlement?"

A Again, I have not – I don't know what to say to elaborate that.

Q Well, you –

A There was never an acceptance of the offer made by Waldron, Duffy to Mrs. Stadtmiller, and I certainly didn't accept it. I didn't have authority to, I never communicated an acceptance, and never did accept it.

Q Now in Item 7, you indicate that "After negotiating with Waldron, Duffy, defendant Waldron, Duffy or its insurance carrier chose to send me a check for the entire amount of the 60 offers, rather than sending 60 separate checks." And again, we can substitute the [p. 53] number 59?

A Yes.

Q And is it your recollection that there was a single check?

A I don't know. I don't see the checks when they come in the office. Rod Jones called me and asked – or I don't recall if it was during one of our conversations, simply asked if he could send one check rather than cutting the 59 or 60, whatever the number was, and I told him sure.

Q In fact, in this case, I believe there were two checks, one from Ohio Casualty, one from Hanover; does that sound to be plausible to you?

A It's certainly plausible, and that is what Ms. Edises told me yesterday.

Q Okay.

A That is the first time I learned there were two checks.

Q All right. So you didn't actually see the checks?

A No, I do not see the checks.

Q Okay. You do acknowledge, however, in your declaration that a portion of the check, and we can change that to checks, was sent on behalf of Beatrice

Stadtmiller, and at that time, remained in your trust account; this was March 19th, 1993?

A Yes.

[p. 54] Q Okay. Now was the manner in which these 59 or 60 cases were resolved insofar as Waldron, Duffy is concerned, typical or unusual in the way that you process the resolution of these cases short of trial?

MS. EDISES: I'm going to object on the grounds that the question is somewhat unintelligible.

MR. LEVY: Well, according to Mr. Wartnick's reaction, it may have been funny, but I don't know if unusual is the right –

JUDGE MAPES: Well, I understood it. If the witness doesn't understand it, I'm sure he'll say so.

Do you understand that question?

THE WITNESS: I believe so.

JUDGE MAPES: Okay. Please answer it then.

THE WITNESS: Asbestos litigation is extremely unusual, and with the numbers of defendants and the numbers of case that are pending, the negotiation process varies from defendant to defendant, and from law firm to law firm, so – all right, there was nothing extraordinary about this. I'm not sure that it's identical to anything I've done before in terms of the methods, but it was certainly within the range of settlement techniques that are used in asbestos cases to resolve large numbers of cases, or to attempt to.

BY MR. LEVY:

Q Okay. Now I take it it is not unusual to settle [p. 55] piecemeal with defendants throughout the course of litigation?

A Well, to settle – in this – yes, to the extent that I obtain offers from defendants and my clients –

Q Accept them?

A – eventually accept them.

Q Right.

A Or eventually reject them, one or the other.

Q It is not unusual to start out with, say, 30 defendants and settle 15 or 20 or whatever and be left with a few either at trial or just before trial; is that true?

A That's more often what occurs –

Q Okay.

A – rather than the contrary.

Q All right. And is that what was going on in these 59 cases, and more specifically, the Stadtmiller case?

MS. EDISES: Objection. The question's overbroad.

MR. LEVY: Why?

MS. EDISES: Because –

MR. LEVY: I said in the Stadtmiller case.

MS. EDISES: Right. Because every case is somewhat different, and he's lumping 59 cases with Mrs. Stadtmiller's case –

MR. LEVY: I'll withdraw the question.

[p. 56] MS. EDISES: – instead of asking just about –

MR. LEVY: I'll withdraw the question.

MS. EDISES: – Mrs. Stadtmiller's case.

JUDGE MAPES: Okay. He's withdrawn the question.

MR. LEVY: And I'll rephrase it.

BY MR. LEVY:

Q Is that what was going on in Ms. Stadtmiller's case?

A Yes. Mr. Jones wanted to talk about that group of cases on behalf of Waldron, Duffy. Mrs. Stadtmiller's case was one of them –

Q Was included?

A – and that was one of the cases that we talked about.

Q Okay. All right. Now apparently there was some type of understanding or agreement with Mr. Jones for the resolution of these 59 or 60 cases insofar as the two of you were concerned?

A Yes.

Q Is that correct?

A That's correct.

Q And included in those 59 or 60 cases was Ms. Stadtmiller's case?

A Yes.

Q And is it true that these discussions took place [p. 57] in or about August of 1992?

A It was over a much more broad – it was over a much broader period of time. I would estimate it was probably over a minimum two or three month period of time.

Q Beginning in?

A Sometime in the spring or early summer.

Q Okay.

A May, June, sometime in there, I would guess.

Q And did they culminate in August of 1992?

A I believe that's correct.

Q Okay. And what happened next after the culmination of the discussions, and I take it, agreement between you and Mr. Jones as to what these cases should settle for on an individual basis?

A I don't –

MS. EDISES: Objection. The question is extremely vague. There's no foundation –

THE WITNESS: Yeah, I don't under – sorry.

MS. EDISES: – that there was an actual agreement –

MR. LEVY: Well, he said there was.

MS. EDISES: – to settle the cases. No, he did not.

THE WITNESS: I didn't say there was –

MR. TIGERMAN: Yeah, I will object. That assumes [p. 58] a fact not in evidence.

MS. EDISES: That's right.

MR. LEVY: Well, now, wait a minute here. I don't want to deal with two opposing counsel. We've started at the beginning with our groundwork that these objections were going to be related to work product and to privilege. And this Counsel appears to not have much respect for that agreement.

MR. TIGERMAN: Your Honor, that is related to the privilege because we're talking again about the thought processes of counsel. I mean, Mr. Wartnick can talk about what – you know, about what transpired in the general sense, but you know, I'm talking about the agreement was that an offer would be made. I think that's what he said, but to assume that there was a settlement made and then – that opened the door on the privilege like that, I – you know, I would just object that that was opening the door on something that doesn't exist.

JUDGE MAPES: Well, I don't know that it's worth arguing about.

Can you rephrase that, Mr. Levy?

MR. LEVY: I will. And I may have varied a bit from what I thought Mr. Wartnick said.

BY MR. LEVY:

Q And I think he said – correct if I'm wrong, you [p. 59] and Mr. Jones had an understanding of what the resolution value of these cases should be?

A Mr. Jones made offers on the 59 or 60 cases, whatever the exact number is, that I indicated to Mr. Jones I considered to be fair and that I considered to be offers that I could recommend to my clients.

Q So you had understandings?

A Yes, to that extent.

MR. LEVY: Is there an objection here?

MS. EDISES: No.

MR. LEVY: Just a deep – all right.

BY MR. LEVY:

Q My question that resulted in this volley was what happened next? Apparently that's overly broad, but – so I'll withdraw it and ask you then did the receipt of the check in your office constitute the next event with respect to the understanding you and Mr. Jones had about the resolution of these cases?

A I don't know.

Q Or checks. Because you don't know when the checks were received?

A If you're asking me in terms of a timing sequence what occurred –

Q Fair enough.

A Even those things that I know, I can't necessarily

* * *

[p. 62] that Ms. Stadtmiller had against the myriad defendants, were you? It was just as to Waldron, Duffy?

A The dismissal that I signed was as to Waldron, Duffy. That is correct.

Q Okay. Do you know why you signed this dismissal?

A Yes.

Q And why was that?

MR. TIGERMAN: Objection, Your Honor. That calls for his thought processes again. Now we're in work product again.

JUDGE MAPES: Well –

MR. TIGERMAN: What was going on in Mr. Wartnick's mind is work product privilege with respect to a pending case. Why he signed the dismissal.

JUDGE MAPES: Okay. I'll overrule the objection on the grounds that the work product privilege is not applicable in this proceeding.

THE WITNESS: Okay.

JUDGE MAPES: Please respond.

THE WITNESS: Okay. This is – to answer the why takes a little bit of background. Is that acceptable?

JUDGE MAPES: Fine, sure.

THE WITNESS: When – at approximately the time that Mr. Jones agreed on offers to my various clients, he asked either at that time or shortly after if they could [p. 63] send us one check rather than cutting checks on the individual files. I said, "Sure, that's fine." Our office was to prepare the settlement papers and send them out

to clients, and he wanted to send the check to me, or checks, whatever the number turned out to be, and requested, I guess about a month later or so, whatever the timing was, that we sign requests for dismissals anticipatory of clients accepting the offers.

He requested this in addition so that he could stop being a named defendant in these cases and therefore, stop having a requirement to pay Berry & Berry, which is – in both San Francisco and Alameda Counties, a law firm that is designated by the Court to conduct general discovery, and bills – it's my understanding bills on a per case basis to each defendant.

And the understanding was that we would – I would sign requests for dismissal for him, and would at the time that my clients accepted the settlement papers, would sign the settlement papers and would forward them to him, and that in the event that any of my clients rejected the settlement offer, we would set aside the request for dismissal, and that case would proceed forward as to Waldron, Duffy.

So that is the reason that that request for dismissal was signed.

[p. 64] BY MR. LEVY:

Q You referred to a law firm, Berry & Berry. Would it surprise you to learn that Mr. Jones says that he didn't know what Berry & Berry was?

A It would shock me.

Q Pardon?

A It would shock me –

Q It would shock you?

A – if Mr. Jones said he didn't know what Berry & Berry was.

Q I'll try and find that in the deposition testimony.

Now what is your understanding of the legal effect of the request for dismissal with prejudice against Waldron, Duffy?

A That they are no longer in the litigation as I indicated to you when we spoke over the telephone. I probably made a mistake in signing a request for dismissal with prejudice as opposed to correcting it to sign it without prejudice. However, Rod Jones did honor the discussions and the agreement that we had.

Q Well, I'm referring, Counsel and Your Honor, to page 94 of – I've got Claimant's exhibit packet for Mr. Jones's deposition instead of my own. And –

JUDGE MAPES: It's 94 of whose exhibit?

* * *

[p. 67] JUDGE MAPES: Well –

MR. LEVY: Well –

THE WITNESS: Could you –

MR. LEVY: We've all been doing this long enough and –

THE WITNESS: Would you rephrase your question –

MR. LEVY: I will.

THE WITNESS: – so I could understand it, please?

BY MR. LEVY:

Q In the course of any litigation, you generally have multiple opportunities to discuss settlement; is that a fair statement to make?

A Yes.

Q Okay. And during the course of those discussions, offers are made?

A Yes.

Q Is that correct? Okay. Do you always give a request for dismissal with prejudice when such an offer is made and file it with the court?

A No. As I told you, I made a mistake in signing a dismissal with prejudice. I should have signed one without prejudice.

Q Well, do you even ever sign a request for dismissal without prejudice when there's been an offer in a case –

[p. 68] A Routinely.

Q – with no acceptance?

A Yes, routinely.

Q You give a request for dismissal without prejudice even before you've discussed with your client whether or not this is an offer to accept?

A Yes.

Q And –

A So long as there is an agreement from the defendant that they will come back into the litigation if the offer is not accepted at that point.

Roger, the costs of litigation in asbestos litigation overwhelm the indemnity payments. I think the Rand study done a few years ago shows that it's something like $2.37 in defense costs or litigation costs for every dollar that goes to victims. And many of these companies are running out of money.

Q I understand that.

A And from their perspective, this is a major inducement to settlement, is to be able to cut off the litigation expense at a particular time, and only if necessary to reenter.

Q Well, I understand that, but –

A And that is regularly ongoing in the Superior Courts and the courts themselves are encouraging it.

[p. 69] Q You know the amount of money that at least Mr. Jones thought he was paying to settle this case, don't you?

A I know the amount of money that Mr. Jones offered to settle this case, yes.

Q And in fact transmitted to your firm along with money for several other defendants?

A Not other defendants, for other plaintiffs.

Q Or other plaintiffs, I'm sorry?

A Yes, sir.

Q All right. And that amount was what in your mind?

A I can't remember it –

Q Four thousand five hundred dollars –

A Oh, for Stadtmiller, right, $4,500. Yes.

Q Okay. And for that transmission, you returned a request for dismissal with prejudice?

MS. EDISES: Objection. Argument –

THE WITNESS: No, that is not correct.

MS. EDISES: – misstates Mr. Wartnick's prior testimony. It's argumentative.

JUDGE MAPES: Well, you – do you want to persist with that question, or – I'm – I'd like to hear it again you want to persist with it, because I'm not sure I heard in it what –

MR. LEVY: All right.

[p. 70] JUDGE MAPES: – Miss Edises heard.

MR. LEVY: All right.

BY MR. LEVY:

Q You gave a request for dismissal with prejudice. That has meaning. It ends the case; is that correct?

A Barring or absent a stipulation or mistake under 473 of the Code of Civil Procedure, yes, that would end the case as to that defendant.

Q And was there such a mistake in this case?

A Yes.

Q When was that discovered?

A It was discovered when this became an issue here.

Q When did that become an issue here?

A Sometime in the last few months. Whenever Victoria contacted me.

There's no question that I should have signed that request for dismissal without prejudice, because that was the intent.

Q I'm not clear, however, what happened in your office after the money was received and the passage of six to seven months before the stipulation was entered, what happened to the money?

A It stayed in our trust account.

Q I'm not clear why it stayed in your trust account for even five months before you became aware of these [p. 71] proceedings? Can you explain that?

A I knew there was a – I don't understand your question.

Q Well –

A I knew there was a Longshore and Harbor Worker Act pending.

Q And how did you know that?

A Because Victoria sent me at least two letters and talked to me about the case on several occasions.

Q And those in fact are Exhibits 3 and 4 on pages 122 and 123 of the Claimant's exhibit packet?

MS. EDISES: I don't think Mr. Wartnick has seen Claimant's exhibit packet so that –

MR. LEVY: I'm going as fast as I can.

THE WITNESS: I have seen the Claimant's exhibit packet.

MS. EDISES: Oh, you have?

THE WITNESS: Yes.

BY MR. LEVY:

Q Well, they're addressed to Mr. Wartnick, and I'm going to ask Mr. Wartnick at this time if he recognizes them?

A I've seen, I believe, signed copies of these letters, yes.

Q And the first one is dated August the 16th, 1992, [p. 72] which is the day after –

A No, I think there's an earlier one, isn't there?

Q Do – are you aware of an earlier letter? The second one in the exhibit packet is dated June 9th, 1992.

MS. EDISES: It's April 16, 1992.

THE WITNESS: Yeah, I'll –

MR. LEVY: Did I say August?

JUDGE MAPES: Yeah, you said August, you meant April.

MR. LEVY: I'm sorry. Okay. I get my A's confused.

BY MR. LEVY:

Q What is your understanding of what Ms. Edises told you in that letter?

A Which, the April letter?

Q The April 16th?

MS. EDISES: May we show the witness the letter?

MR. LEVY: Yeah, he's – sure.

THE WITNESS: Thank you.

Okay.

BY MR. LEVY:

Q Do you remember the question?

A I think the letter is self-explanatory. She asked for a copy of the complaint, I believe, and I assume I sent her one. I don't recall doing it, but I assume I did, or [p. 73] somebody in my office did, and she told me that we couldn't settle any portion of the civil case as to Mrs. Stadtmiller.

Q Well, let me ask you what your understanding is of these particular sentences.

"Also, since Mrs. Stadtmiller is receiving Longshore Compensation payments, she cannot accept any civil settlements without the consent of the Longshore Compensation insurance carrier. Therefore, if you receive any

civil settlement offers for Mrs. Stadtmiller, please advise and I will attempt to obtain the consent of Industrial Indemnity, the Longshore Compensation carrier."

What is your understanding of that language?

A I think it's straightforward.

Q Okay. Ms. Edises says in her letter that Mrs. Stadtmiller is receiving Longshore Compensation payments and therefore cannot accept any civil settlements without the consent of the Longshore insurance carrier, okay?

Now what is your understanding of accept civil settlements?

A That she can't accept a civil settlement. She can't settle her case.

Q Okay. And what does it take to settle her case?

A A signed release.

Q You think a signed release is necessary?

[p. 74] A Yes.

Q Okay. Do you believe that you could have merely sent the money from the trust account and not obtained a signed release and avoided the admonition that Ms. Edises was giving you?

MS. EDISES: Objection, unintelligible.

MR. LEVY: To you – I –

BY MR. LEVY:

Q Do you understand it?

A What I could have done? I could have – I suppose I could have, and if I do so, I'm probably defrauding whatever insurance companies Rod Jones is representing because he insisted on a – as is his right, to releases being signed before any money was disbursed.

Q Would it – all right. Would it surprise you to hear that Mr. Jones testified that the return of the release is not essential and in fact, in many cases, the releases don't come in for a year or so, and maybe –

MS. EDISES: Object –

BY MR. LEVY:

Q – and maybe in some cases, never come in?

MS. EDISES: Objection.

MR. LEVY: I'm only –

JUDGE MAPES: What's the objection?

MS. EDISES: Mr. Levy has misstated [p. 75] Mr. Jones's testimony.

MR. LEVY: Well, all right, let me –

THE WITNESS: Do you want me to respond?

JUDGE MAPES: In what respect has he misstated it?

MS. EDISES: Mr. Jones testified that the settlements were contingent upon receipt of a release. He also testified that he wasn't worried about not receiving a release if there was a settlement, that sometimes the releases come in piecemeal, but he also testified that he always receives a release.

But he was clear in his testimony that any settlement was contingent upon receipt of a signed release.

MR. LEVY: That's not clear. In fact, he said there may have been instances in his office where no release was ever obtained. And that in fact the release of the dismissal with prejudice ended the case –

MS. EDISES: Right.

MR. LEVY: – as far as he or his client was concerned.

MS. EDISES: Your Honor, again, I object –

MR. LEVY: It's in the deposition. I'm only asking –

JUDGE MAPES: Well –

MS. EDISES: Misstates Mr. Jones's testimony.

JUDGE MAPES: – what does this – now the

* * *

[p. 96] notice, right?

MS. EDISES: Right.

MR. LEVY: Can – exactly. Can we have a stipulation then that consent was never obtained or sought? Is that – will you agree to that?

MS. EDISES: No, I'm not agreeing to anything.

MR. LEVY: Okay. Fine. Let's go on.

MS. EDISES: You know, the time to approach with agreements was before the proceedings. I'm sorry,

Your Honor. I think these are side bar and don't really belong here.

JUDGE MAPES: Well, I don't doubt that Mr. Levy will be able to establish it with the witnesses that his client didn't get notice and didn't get consent, so –

MR. LEVY: All right. That's fine.

JUDGE MAPES: – let's move on.

MR. LEVY: Okay.

BY MR. LEVY:

Q Was money ever returned to Waldron, Duffy on behalf of Ms. Stadtmiller?

A Yes.

Q Okay. And when was that?

A I don't have the exact date. It was within the last 60 days, I would – I believe.

Q Well, the stipulation allowing withdrawal was [p. 97] signed, I believe, by you and Mr. Jones on or about May 20th, 1993.

A The check – our trust account check was returned to them simultaneous –

Q Okay.

A – with the stipulation.

Q And that stipulation appears to have been prepared by your office?

A That's correct, it was.

Q You recognize it?

A Yes, I do.

Q It's on page 124 of Claimant's exhibits. And it is dated May 20th?

A If that's the date that Mr. – that Rod Jones signed this –

Q Okay.

A – that is the date that the check was delivered.

Q Now the copy that is provided in the Claimant's exhibit packet doesn't show that it was ever signed by the Judge of the Superior Court. Is that the case or –

A No, it definitely was signed.

Q It was signed?

A Do you have – we have – I think Steve has a copy with him.

MS. EDISES: We have a – yeah, it was signed.

[p. 98] JUDGE MAPES: Would somebody like to offer that, or would you stipulate that it's been signed?

MS. EDISES: Well, Your Honor, I thought that I did offer it.

JUDGE MAPES: Oh, did you offer it?

MS. EDISES: Let me check.

MR. LEVY: Well, no, it's in the exhibit pack, but it's not signed by a judge, so –

JUDGE MAPES: No, I mean – well, I mean a signed copy?

MS. EDISES: Oh, you're right.

MR. LEVY: May I just see it, and if I can take a look, I'll be happy with it.

It appears that Judge Kawaichi –

MS. EDISES: Kawaichi.

THE WITNESS: Kawaichi.

MR. LEVY: – Kawaichi signed it the day after you guys did on May 21st; is that your understanding of when it happened?

JUDGE MAPES: So will the parties stipulate then that it's been signed by the Superior Court Judge?

MR. LEVY: I will.

JUDGE MAPES: Fine.

BY MR. LEVY:

Q Okay. And you think your trust account was [p. 99] returned at about that time?

A It was delivered to Mr. Jones together with the stipulation.

Q Okay. Now you were aware some months before that this controversy had developed; is that right?

A I was certainly aware in March, yes.

Q Okay. You weren't made aware until March?

A I don't know – I say that because I've got my – I'm looking at my declaration dated March 19th.

Q Oh.

A I don't know whether I was advised in February or March; it was sometime in that time period.

Q Why did you choose to enter into the stipulations in May and return the money in May?

A I didn't choose to. My client rejected the settlement offer.

Q Why didn't you just send the money back in March and say the offer's unaccepted? Hasn't been accepted?

A Because Mrs. Stadtmiller had not yet rejected the offer.

Q When did she reject the offer?

A Sometime shortly before the May 20th date. I don't know exactly when, but it would have been sometime in late April or early May.

Q Was there any communication between August and

* * *

[p. 109] CROSS EXAMINATION

BY MS. EDISES:

Q Mr. Wartnick, is Mrs. Stadtmiller the only member of the Stadtmiller family which your firm represents?

A No.

Q You also represent the decedent's children?

A Yes, we do.

Q And insofar as the Stadtmiller case is concerned, do you have day to day management and control over the case?

A No. The Alameda County cases in my office are under Madelyne Chaber's supervision.

Q Okay. So insofar as what goes on from day to day, you do not really have much input into what goes on in this particular case?

A I have input, but I don't follow it on a day to day basis.

Q All right. Now did you settle Mrs. Stadtmiller's case against Waldron, Duffy?

A No, I did not.

Q Would you explain to the Court –

MR. LEVY: I'm going to object to the question and ask that the answer be stricken. It calls for a conclusion in that form.

JUDGE MAPES: Well –

MR. LEVY: I mean, I refrained because that's the [p. 110] ultimate question in this case; has there been a settlement, at least insofar as Section 33G contemplates it.

JUDGE MAPES: Well, that certainly is the ultimate question, and I'm – I think he's entitled to give his opinion as to –

MR. LEVY: Okay, as long as it –

JUDGE MAPES: – whether he thought it was a settlement or not.

MR. LEVY: All right.

JUDGE MAPES: But I realize that his opinion and his conclusion and –

MR. LEVY: That's fine. That's fine.

JUDGE MAPES: Fine.

BY MS. EDISES:

Q Would you explain to the Court what transpired between you and Roderick Jones, the attorney for Waldron, Duffy regarding settlement in the Stadtmiller civil case?

A Well, yeah, I think I've done that over the last couple of hours.

Over a period of months, we had a negotiation process on a group of about 60 cases that went back and forth. At the very commencement of that process, I told Rod that anything we did would have to be on a recommend basis. With 60 individuals involved, it's impossible to go back and forth, communicate each offer as we go through, get [p. 111] acceptance or rejection, that what we would be negotiating were numbers that I could recommend to clients.

We – in late July, or I think it was early August, arrived at numbers in the group that I felt were reasonable and that I could comfortably recommend to the clients, and at some point in the process, it was agreed that our office would prepare the settlement papers in terms of the releases, that it would be a – whatever form of release was acceptable. There are a couple of standard

forms that are generally used that the court has looked at and has found acceptable in San Francisco.

The – at some point in the process, Rod asked me if we wanted one check or multiple checks, that it was easier for them to cut one check, and we said that was fine. And that we would hold the money in our trust account until individual clients returned releases and those were signed to him.

We talked about cutting off their defense expense and obligation through Berry & Berry. We agreed – or I agreed that we would sign requests for dismissals in order that they could report that – to Berry & Berry and otherwise that they were no longer actively involved in the litigation, with the understanding that if a client rejected the offer, at that point, they would reenter the litigation and would effectively be bound by whatever occurred in [p. 112] the interim.

The – this case and the other cases proceeded in that manner. I have received Victoria's letters telling me we could not settle because of the Longshore situation. I knew that I did not have authority from any of my clients to accept the offers from Waldron, Duffy, but that what we were negotiating were settlement offers that I felt comfortable that I could recommend.

We awaited word from Victoria to let us know when we could settle on behalf of Mrs. Stadtmiller, and certainly, we were never told that the Longshore case, either that the offers had been approved by the Longshore carrier, or that for other reasons, the admonition that she had sent was lifted.

Eventually, Mrs. Stadtmiller said in light of – I assume in light of what was going on that she was rejecting all of the offers, and this offer. We so advised Waldron, Duffy. They lived up to what they had agreed to do, which was that if any client rejected the offer, they would sign a waiver or vacation of the request for dismissal and would reenter the litigation.

Q Has in fact –

A And that's where we are right now.

Q – Waldron, Duffy reentered the litigation?

A Yes.

[p. 113] Q And you mentioned Berry & Berry. Would you explain who Berry & Berry is and what's a Berry & Berry cost; would you explain how that works generally?

A Okay. Asbestos litigation has been declared complex litigation in both San Francisco Superior Court and Alameda Superior Court, and I think they may involved up in Solano as well; I'm not sure.

In both – certainly in San Francisco, and I believe this is in Alameda as well, the Court appointed the law firm of Berry & Berry to be defense coordinating counsel for all sorts of routine functions in litigation.

If there are 30 defendants, and each defendant is noticing the plaintiff's deposition on a different day, there's chaos. Or if there are records that have to be subpoenaed. If each defendant is subpoenaing the same record, again, there's immediate – there's chaos.

And the Court has appointed Berry & Berry to coordinate these discovery functions on behalf of all defendants.

Their compensation method is privileged. I don't have access directly to it, however, I know – I'm plaintiff's coordinating counsel in San Francisco in the complex litigation, and I know that they are billing on a case by case basis, and that the defense costs to Berry & Berry can add up to huge amounts of money for a defendant [p. 114] over time.

And many defendants wish to avoid those costs, and frankly, to use some of that money to settle cases. That if they can use the money that they're paying to Berry & Berry over a year period of time, save that and use it to help fund a settlement. Everybody benefits.

And I hope that answers the question in terms of what their role is.

Q Okay. And is – has it been your belief, Mr. Wartnick, that you have had instructions from me not to enter into any settlements on behalf of Mrs. Stadtmiller?

A Yes.

Q And in fact, have there ever been any releases prepared in the Stadtmiller civil case?

A No, there have not.

MS. EDISES: Thank you. I have no additional questions.

JUDGE MAPES: Mr. Levy?

MR. LEVY: Yeah, I do. Thank you.

REDIRECT EXAMINATION

BY MR. LEVY:

Q Is it your belief today, Mr. Wartnick, that the $4,500 constituted a release of – excuse me – constituted an amount – would have constituted an amount to settle the Waldron, Duffy exposure to costs alone?

* * *

APPENDIX F

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER, Claimant,	)	No. OALJ 92-LHC-2755
vs.	)	OWCP 13-87454
MALLOT & PETERSON EMPLOYER, AND INDUSTRIAL INDEMNITY Carrier	)	

DEPOSITION OF RODERICK D. JONES

THURSDAY, MAY 27, 1993

[p. 3] BE IT REMEMBERED that pursuant to Subpoena of Taking Deposition, and on Thursday, May 27, 1993, commencing at the hour of 10:13 a.m. thereof, at the offices of Messrs. Archer, McComas & Lageson, 2033 North Main Street, Walnut Creek, California, before me, MICHELE L. CARMODY, a Certified Shorthand Reporter in and for the State of California, personally appeared.

RODERICK D. JONES

called as a witness by the defendants, who, being by me first duly sworn, was thereupon examined and interrogated as is hereinafter set forth.

MESSRS. ARCHER, MCCOMAS & LAGESON, represented by RAND CHRITTON, Esq., 2033 North Main Street, Suite 800, Walnut Creek California 94596, appeared as counsel for the witness.

KAZAN, MCCLAIN, EDISES & SIMON, represented by VICTORIA EDISES, Esq., 171 Twelfth Street, Third Floor, Oakland, California 94607, appeared as counsel for the claimant.

MESSRS. LAUGHLIN, FLABO, LEVY & MORESI,

* * *

[p. 12] Q. Is Nandor Krause presently associated with the firm?

A. Yes.

Q. Is that Miss or Mr?

A. Mr.

Q. Do you each have your own files in the case or does the firm work out of one file for both clients or insurers?

A. We each have our own files.

Q. With respect to the Waldron Duffy matter, when did you become involved in the representation?

A. I have no idea.

Q. Do you have a rough estimate recollection?

A. It would be so rough as to be almost a guess.

Q. Incidentally, where is the physical file at this point?

A. Somewhere in this office. But I can't tell you if it's sitting on my desk.

Q. It's not in storage or some other location; is that right?

A. No.

Q. What's the present status of the litigation with respect to your client, Waldron, Duffy?

A. The status?

MR. CHRITTON: The status from our office? Status with the court? Status with plaintiff's counsel?

[p. 13] MR. LEVY: Well, whatever?

THE WITNESS: The file is open.

MR. LEVY: That's all I wanted to know.

MS. EDISES: In other words, the litigation is pending?

THE WITNESS: I think that's fair to say.

MR. LEVY: Q. With respect to the litigation, where do things stand? Is there a trial date or settlement conference?

A. I can't tell you that.

Q. I'm going to show you a copy of a document that's noted as a request for dismissal. It was filed in the Alameda County Court and I gather that's Superior Court by the designation here, September 11, 1992. And it bears

in the area designation for attorneys, Roderick D. Jones, of Archer, McComas – lower case – typo of some kind – do you recognize that document?

A. I do.

MR. LEVY: We're going to have this copied and marked as Defendant's Exhibit 1.

(Whereupon, the photostatic copy of the request for dismissal was marked as Defendant's Exhibit 1.)

MR. LEVY: Q. Can you identify this document for us?

A. It appears to be a request for dismissal.

Q. Do you recognize the name of the person who

* * *

and [p. 16] you last spoke with Mr. Wartnick.

MR. CHRITTON: And I'd just paraphrase what you're saying about the settlement, it appears that we don't have one at this time.

MR. LEVY: We're going to get to this in this case whether or not there is a settlement. And I understand, as far as for the record, as far as your firm is concerned and your client is concerned, there isn't a settlement?

MR. CHRITTON: Appears not.

MR. LEVY: Q. Against that background, tell us what happened.

A. The Stadtmiller case was one of several, and I can't tell you precisely how many, but it was in a group of cases that we had with Cartwright's office.

I reviewed those cases, including such things as answers to interrogatories, medical reports, et cetera, et cetera, in an effort to evaluate each of the claims. And I came up with a list of cases and my proposed evaluations, they may have been outright dismissal cases, they may have been cases we were willing to put money on, and I sent that list off to the Cartwright office.

Q. About when was that?

A. I can tell by looking at the date on the filing of the dismissal. In the Stadtmiller case it had to have been sometime in late summer of 1992.

So after I prepared the list and sent it off to

* * *

[p. 21] MS. EDISES: No releases?

THE WITNESS: The releases come later.

MR. LEVY: Q. So the signed dismissal isn't required before the check's delivered, but it's required before the check is allowed to be negotiated?

A. Correct. Actually, I think what happens is the dismissals are prepared and sent over ahead of time, and we ask them to get them all signed and call us when they're ready to go. And then the paralegal gets the check.

Q. And It's the duty of the paralegal to make sure that each and every dismissal is there as outlined by you

in the cases before the check can be delivered or handed to a representative of Mr. Wartnick's firm.

A. Yes.

Q. Then you say releases come later; is that right?

A. Yes.

Q. Was a release ever received by your firm, to your knowledge, from Beatrice Stadtmiller in this case?

A. No.

Q. Under those circumstances, what was your procedure in this case?

A. I'm not sure what you're asking me?

Q. Did you care that you didn't get a release?

A. Ultimately, I would be concerned, yes. But, typically, the releases kind of filter in one or two at a time apparently because it takes some time for plaintiff's

* * *

[p. 26] Q. All right. Now, do you believe that's Mr. Wartnick's understanding?

A. I believe that's his understanding.

Q. Now, on that basis, then did you sign the stipulation?

A. Yes, I did.

Q. Is there some recital in the stipulation about this understanding?

A. I don't think so.

Q. What exactly does the stipulation say?

A. Just that I had agreed to vacate.

Q. Do you and Mr. Wartnick have anything in writing confirming this understanding?

A. No.

Q. Has the stipulation been filed with the court?

A. I don't know that, but I suspect that it has been.

Q. And that would have been within the last two weeks?

A. Yes.

Q. I take it this was all finalized after the second conversation with Mr. Wartnick?

A. That's true.

Q. Were any of the funds that were delivered by you – by your firm, back in September, returned to your firm or your clients?

A. Yes.

[p. 27] Q. Do you know if they've actually been returned or there's just been a promise to return?

A. No, we have received a check from the Cartwright office.

Q. Do you know the amount of the check?

A. Again, I think it's forty-five hundred.

Q. Do you believe it was the identical amount that was allocated to Mrs. Stadtmiller?

A. Yes.

Q. There was no interest or anything like that in the check?

A. No.

Q. There was none?

A. No.

Q. Did you see the check itself?

A. Yes.

Q. Was it marked "trust account" or anything?

A. I believe it was from the trust account of the Cartwright firm.

Q. That was within the last two weeks?

A. Yes.

Q. And I take it, then, that the file is in your office and nothing active is going on in it other than what we're doing today?

A. I think that's a fair assessment.

Q. I'm almost finished.

[p. 30] MR. CHRITTON: Obviously, I am trying to understand what your question is and the parameters. I don't want Mr. Jones to be asked to determine a term that has certain implications to you folks. I don't want him to stumble into something.

MR. LEVY: If you don't want him to answer that, it's fine.

THE WITNESS: When you asked me what my understanding of a settlement is or how I define it, I assume that you're asking me to use that term in the context that I'm used to using it in settling my cases that I deal with.

MS. EDISES: Yes, that's correct.

THE WITNESS: A settlement to my mind is a consideration that's given in exchange for a release, dismissal of some sort of legal action.

MS. EDISES: Q. In so far as your custom and practice is concerned, do you consider a settlement to be entered into after money is exchanged for a release and dismissal of a legal action?

MR. LEVY: And I have the same objection.

THE WITNESS: Can I hear the question again?

(Record read.)

MR. LEVY: That's been asked and answered.

THE WITNESS: Yes.

MS. EDISES: Q. Is a settlement in force not [p. 31] entered into within the auspices of the –

MR. CHRITTON: That calls for a legal conclusion.

THE WITNESS: I didn't hear all of your question.

MS. EDISES: Would you wait until I finish before you make your objection. Thank you.

Q. Is a settlement unenforceable under California law without a written settlement agreement?

MR. LEVY: My objection would have been that you haven't established this individual as an expert to testify in this area, but I'll stipulate that he is – I don't think you can just go off and ask him these things.

THE WITNESS: My understanding is it is not enforceable.

MS. EDISES: Q. Now, in terms of your meetings with Mr. Wartnick, and in terms of the Stadtmiller case, would it be correct that you met with Harry Wartnick on approximately a group of about 60 cases, that you submitted offers to him on that group?

A. Are you referring to the group that Stadtmiller was in?

Q. Yes.

A. I really can't tell you how many cases were in that particular group. That's not an unusual number. It could have been, but I just am not sure.

Q. In terms of the Stadtmiller case, do you believe that you and Mr. Wartnick sat down face-to-face and talked

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[p. 33] Q. So you believe that he had that authority or this would be his recommendation to his client?

A. Frankly, I'm not sure what my state of mind was in that regard at the time that we were dealing with this particular group of cases.

Q. Now, was the agreement that you had with Mr. Wartnick and the payment of money contingent upon your receiving signed releases from Mrs. Stadtmiller and the other plaintiffs in the Stadtmiller case?

A. Yes, that was the understanding.

Q. And would your client allow you to settle – and when I say "your client," I mean Waldron, Duffy – allow you to enter into a settlement or settle a case without a written release – written, signed release?

A. I don't know whether they would allow me to do that or not. I don't recall if I ever received any specific instructions from them one way or the other.

Q. But your custom and practice is not to consider a settlement completed without a written release?

A. That's my custom and practice.

Q. And the release is contingent or the release is a condition of settlement? Is that correct, sir, the release is a condition of settlement? In other words, you do not have a settlement without a written, signed release?

MR. CHRITTON: We understand what you're driving at, counselor. There are a number of cases we settle [p. 34] without settlement releases and without formal release. In other words, in a particular case if there's no money made we will get a dismissal without a formal release being filed or being sent or being signed.

MS. EDISES: Q. What happens if you pay money and you get a dismissal, but don't get a release?

A. What happens?

Q. Has that ever happened?

A. It may have. I think eventually we get releases. Somebody may have moved to tin-buck-too and the plaintiff's attorney is having a hard time tracking his client down. But I think eventually we get the signed release.

I can't honestly say that we have any files in the office where we haven't ultimately gotten the release, although, there may be some. My own personal feeling is as long as I have the dismissal I feel somewhat comfortable.

Q. But getting the release is a condition of the settlement, is it not?

A. That's true.

Q. Do you consider that Mrs. Stadtmiller's civil action against Waldron, Duffy has been settled?

A. No.

Q. Prior to this deposition today have you ever spoken with any member of Mr. Levy's office regarding the Stadtmiller case?

A. I believe when I received a witness fee check and

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